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Docket No. 82-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

BRIEF *AMICUS CURIAE* ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF JOSEPH DURIS, RESPONDENT,

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vs.

JOSEPH DURIS,

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BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF JOSEPH DURIS, RESPONDENT,

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

CONSENT OF PARTIES

Pursuant to Rule 36 of the U. S. Supreme Court Rules, this Brief Amicus Curiae is being filed with the written consent of all parties to the case, copies of which are attached hereto, in support of Joseph Duris, Respondent.

STATEMENT OF INTEREST

This Brief Amicus Curiae is being submitted by the Admiralty Law Section of the Association of Trial Lawyers of America, a national Bar Association consisting of more than 50,000 lawyers who primarily represent Plaintiffs in personal injury and death litigation and workmen's compensation. The Admiralty Law Section includes most of the attorneys throughout the United States who specialize in Maritime Personal Injury Law.

The pending case is of great importance and will decide the maritime law on the question presented. It will affect the welfare of many Plaintiffs in maritime cases now pending throughout the United States.

We believe that, based on our research and analysis of the law and our experience in the maritime law and the interests of safety of workmen on board vessels, our brief argument will be of assistance to the Court.

Our Brief will be limited to the following questions presented without any reference or review of the facts.

QUESTION PRESENTED

Whether the mere acceptance of workmen's compensation, paid voluntarily by the employer under the Longshoremen's and Harbor Workers' Compensation Act, without the entry of an award or an order requiring payment of compensation filed by the Deputy Commissioner or Benefits Review Board, is sufficient to trigger the assignment provision of 33 U.S.C. § 933 (b)?

SUMMARY OF ARGUMENT

In its present form, § 33 of the Longshoremen's and Harbor Workers' Compensation Act permits the injured employee to receive compensation from his employer and also pursue his claim for damages against a negligent third party. The employee is not

required to elect between these remedies. The Section provides that only if the employee accepts compensation "under an award in a compensation order filed by the deputy commissioner or Board," the third party claim is assigned to the employer unless the employee commences such action "within six months after such award." The decision of the Sixth Circuit herein correctly interprets not only the wording of the statute but also the intent of Congress to prevent an unwitting assignment by the injured employee, and should be affirmed.

As reasonably enacted with the Act in 1927, § 933 required the injured employee to elect whether to receive compensation from his employer or pursue his potential third party claim. The acceptance of any compensation operated as an automatic assignment to the employer of claims against third parties. In 1938, Congress amended § 933 to eliminate this harsh result, so that the statute

provided that only the acceptance of compensation "under an award in a compensation order filed by the deputy commissioner" worked an assignment of the third party claim to the employer. Only a final award, fixing the total compensation payable to the employee, would cause such assignment. The acceptance of voluntary compensation payments clearly did not. In 1959, Congress again amended § 933, to further expand the rights of the injured employee, by delaying the assignment of third party claims until six months after the acceptance of compensation "under an award in a compensation order filed by the deputy commissioner." Thus, the Section still requires an affirmative order by the deputy commissioner or other agency of the U. S. Department of Labor, both fixing the total amount of compensation and requiring that it be paid, before the assignment provision is triggered.

The decision of this Court in Rodriguez v. Compass Shipping Co., 451 U.S. 596 (1981), compels that the Section be given that reading, the language therein being unequivocal. Rodriguez compels affirmance of the present case.

The overly-broad reading of § 933 urged by the Petitioner disregards the language of the statute itself, as well as the mandate of this Court that the Act be liberally construed in favor of the injured employee. Such interpretation would produce the exceedingly harsh result of imposing a six month statute of limitation on the injured employee and is completely unnecessary to protect the rights of employers under the Act. The General Maritime Law clearly requires that the employer be reimbursed its compensation payments out of the injured employee's third party claim and clearly permits the employer to pursue the third party itself, without statutory assignment.

The result of a six month limitation upon the injured employee, as urged by the Petitioner, would be the unfortunate flooding of the Courts with suits which would have to be filed without any reasonable opportunity for investigation or opportunity to weigh the economic impact of the injury. Many of such suits would be without merit, while many meritorious claims would be lost unwittingly by the injured employee. To avoid such harsh results, the shipowner should not be permitted to create by slight of hand an award where none exists.

ARGUMENT

CONGRESS CLEARLY DID NOT INTEND THAT THE MERE ACCEPTANCE OF WORKMEN'S COMPENSATION BY A LONGSHOREMAN, PAID VOLUNTARILY BY HIS EMPLOYER UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, SHOULD TRIGGER THE ASSIGNMENT PROVISION OF 33 U.S.C. § 933 (b). ONLY THE ACCEPTANCE OF COMPENSATION PAID PURSUANT TO "AN AWARD IN A COMPENSATION ORDER FILED BY THE DEPUTY COMMISSIONER OR BOARD" SHOULD WORK THE ASSIGNMENT OF THE LONGSHOREMAN'S THIRD PARTY CLAIM TO HIS EMPLOYER, SIX MONTHS AFTER SUCH AN AWARD.

The present case requires an interpretation of the language selected by Congress in § 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933, which relates to the prosecution of third party claims by an injured longshoreman after payment of compensation by his employer. In its present form, the relevant portions of that section provide as follows:

> "(a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
>
> (b) Acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner or Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." [Emphasis added.]

In its recent decision in Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981), this Court held that once an award had been entered, and the longshoreman failed to file suit within six months thereafter, § 933 (b) worked an absolute and irrevocable assignment to the employer or compensation carrier of any rights against a third party. However, the Court made it clear that it assumed, for the purposes of that decision, that an award or an order requiring payment of compensation had been entered in each of the companion cases. Rodriguez, 451 U.S. at 598, fn. 3. In fact, in each of the three cases consolidated therein an order of some type had been entered by the Deputy Commissioner, Administrative Law Judge or Benefits Review Board, either after litigation or formalizing a settlement agreement between the parties, fixing the total amount of compensation owed the employee and requiring payment of that compensation. See, for

example, Rodriguez v. Compass Shipping Co., Ltd., 456 F.Supp. 1014 (S.D.N.Y. 1978), affirmed, 617 F.2d 955 (2nd Cir. 1980).

The question presented in the case now before the Court is the meaning of the words "award in a compensation order filed by the Deputy Commissioner or Board" used by Congress in § 933 (b) to define the event which triggers the six month period which could culminate in an assignment of the employee's rights against third parties to the employer. The Petitioner contends that a voluntary payment of workmen's compensation to the employee, coupled with the filing, by the employer, of report forms LS-206 and LS-208 (both required of the employer in all cases under the Act) somehow constitutes "an award in a compensation order filed by the Deputy Commissioner or Board."

The Decision Below

Responding to the same contention by the shipowner-petitioner below (there being no dispute as to the material facts) the Sixth Circuit first set out the procedure for payment of compensation established by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., as follows:

> "Shortly after his injury, Duris began to receive benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. Under that statute and its regulations, injured employees receive compensation in one of two forms. If the employer controverts the claim, any benefits are paid pursuant to an award documented in a compensation order. 33 U.S.C. § 914; 20 C.F.R. §§ 702.251-.351 (1981). If, on the other hand, the claim is not contested, compensation is paid voluntarily without an award. 33 U.S.C. § 914, 20 C.F.R. §§ 702.231-242 (1981). It is undisputed that Duris' benefits were paid voluntarily; the Secretary of Labor entered no compensation order or award in this case." [684 F.2d at 353.]

The Court below, in rejecting the contention now made by the Petitioner herein, stated and explained its holding in the following words:

> "We will not, therefore, read Section 33 to encompass all claims paid under the Act. Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third party claim does not expire in six months. The Second Circuit gave due consideration to the policy against unwitting assignments and reached a similar conclusion. Rodriguez v. Compass Shipping Co., Ltd, 617 F.2d 955 (1980), affd. on other grounds, 451 U.S. 596 (1981).
>
> Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provisions of Section 33 (b). Hence, Duris' claim is not time barred." [684 F.2d at 355.]

We respectfully submit that the decision by the Sixth Circuit in the present case is an imminently correct interpretation of the intent of Congress and the wording contained in § 933 (b) and should be affirmed by this Court.

Section 933 in the 1927 Act

The present case calls upon the Court to interpret amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., which was originally enacted in 1927. However, the amendments to the Act under consideration herein are those adopted by Congress in 1938 and 1959, wherein § 933 (b) was substantially changed from its original wording. The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act made no change in the wording of this Section, except for the reference to a compensation award by the "Board," to accomodate the administrator of appeals to the Benefits Review Board, added by the 1972 amendments.

When enacted as part of the original Longshoremen's and Harbor Workers' Compensation Act in 1927, § 933 (§ 33, 44 Stat. 1440) provided as follows:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the Deputy Commissioner in such manner as the commission shall provide, to receive such compensation or to recover damages against such third person.
>
> (b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to the compensation has notified the deputy commissioner of his election."

Under this wording, as the Section was originally enacted, the Courts held that acceptance of any workmen's compensation precluded the employee from suing a third party tortfeasor. Sciortino v. Dimon S.S. Corp., 39 F.2d 210 (E.D.N.Y. 1930), affirmed, 442 F.2d 1019 (2nd Cir. 1930); Johnsen v. American-Hawaiian S.S. Co., 98 F.2d 847 (9th Cir. 1938).

The Act also required by § 914 that, unless liability for compensation was

contested, the employer must begin payment of workmen's compensation within two weeks of the injury. It quickly became apparent that, because of the combination of the prompt payment requirement of § 914 and the election of remedies mandate contained in § 933, a substantial injustice was being worked upon the injured longshoreman. At the time he was least able to do so, he was forced to make an election between his limited but relatively automatic compensation remedy and his potential damage remedy against a negligent third party.

The 1938 Amendment

To eliminate this harsh result of what was intended to be remedial legislation, Congress amended § 933 in 1938 (June 25, 1983, c. 685, §§ 12, 13, 52 Stat. 1168) to read as follows:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person

entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person." [Emphasis added.]

The Section was so worded when American Stevedores v. Porello, 330 U.S. 446 (1946) came before this Court. The contention was made that, regardless of the wording of the 1938 amendment, the acceptance of compensation nonetheless operated as an election not to sue the third party. In disposing of that contention and interpreting the intent of Congress by that amendment, this Court stated:

"When impleaded by the United States in the trial court, American, the Petitioner here, pleaded as an affirmative defense that Porello, having accepted compensation payments from

American, lost whatever right of action he had against the United States as a third party tortfeasor. The Petitioner admits that § 33 (b) of the Longshoremen's Act was amended in 1938 so that mere acceptance of compensation, without an award, does not operate as an assignment to the employer of the injured employee's cause of action against a third party tortfeasor, a conclusion which Courts had reached under the former wording of the Act. But it contends that the amendment did no more, and that acceptance of compensation still operates as a conclusive election not to sue. It is quite clear that mere acceptance of compensation is not the kind of election for which provision is made by § 33 (a) of the Act, which provides for notice of intention to the deputy commissioner, so the argument is technically imperfect. But in any event, election not to sue a third party and assignment of the cause of action are two sides of the same coin. Surely the Act was never intended and has never been held to provide that after acceptance of compensation, and until an award, neither employer nor employee could sue the third party tortfeasor. If so held, an employer who was not responsible over to the third party might lose his chance to recoup compensation payments from the third party, while the third party might escape all liability. . . .

Congress has provided that unless an employer controverts the right of the employee to receive compensation, he must begin payments within two weeks of the injury. The employee thus receives compensation payments quite soon after

his injury by force of the Act. Yet the Act does not put a time limitation upon the period during which an employee must elect to receive compensation or to sue, save the general limitation of one year upon the time to make a claim for compensation. The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor." [330 U.S. at 454-456. Emphasis added, footnotes omitted.]

The foregoing interpretation of the 1938 amendment was completely consistent with the intent of Congress, as reflected in the Committee report accompanying the amendment.[1]

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1. The amendment's purpose was expressed in the House Report:

> "The purpose of this amendment is to remove possible cause of complaint regarding the operation of the provision

Thus, the legislative history clearly indicates that Congress intended that there must be some affirmative official action by the deputy commissioner, or other agency of the U. S. Department of Labor, establishing an award of compensation, before the employee's acceptance of compensation could consti-

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of subdivision (b) of Section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tortfeasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person . . . to consider the acceptance of compensation from the employer with the resulting right to bring suit in damages against the third party, or a refusal of compensation so as to pursue the remedy against the third party alleged to be liable for the injury." H R Rep No. 1945, 75th Cong., 3d Sess. 9 (1938). See Rodriguez v. Compass Shipping Co., 451 U.S. at 605.

tute an assignment of his claim against third parties. Decisions from the Circuits were in accord that § 933 (b) required an affirmative order, both requiring the employer to pay compensation and fixing the total amount of compensation payable to the employee. Mitchell v. The Etna, 138 F.2d 137 (3rd Cir. 1942); Roeben v. U. S., 113 F.Supp. 732 (D.C.N.J. 1953); Whyatt v. U. S., 92 F.Supp. 543 (S.D.N.Y. 1950). Under § 933 (b), as amended in 1938, the assignment of the third party claim took place upon acceptance of compensation after a formal order by the deputy commissioner awarding compensation. Any other action by the deputy commissioner lacking finality with respect to the compensation, such as a recommendation not binding upon the parties, was not sufficient to cause assignment of the third party claim to the employer. In Grasso v. Lorentzen, 56 F.Supp. 51 (S.D.N.Y. 1944), affirmed, 149 F.2d 127 2d Cir. 1945), Cert. denied, 326 U.S. 743,

rehearing denied 328 U.S. 870, the Court held that a memorandum entered by the deputy commissioner which recommended, but which did not require payment of compensation, did not constitute "an award in a compensation order" sufficient to work an assignment of the employee's claim.

Although the 1938 amendment did thus prevent the unwitting assignment of the third party claim by acceptance of voluntary compensation payments, it nonetheless still required the employee to file notice of his election to sue the third party. Upon such election, the employer then had the right to suspend compensation payments. Nacirema Operating Co. v. Andruzzi, 185 F.Supp. 344 (E.D.Pa. 1960).

The 1959 Amendment

In 1959, Congress once again amended § 933, both to completely eliminate the requirement that the employee make an

election between remedies and also to delay the automatic assignment of the third party claim until six months after the acceptance of compensation "under an award in a compensation order." Placing § 933 in its present form, the 1959 amendment changed subparts (a) and (b) to read as follows:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
>
> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." [Emphasis added.]

Following the 1959 amendment of the Section to the above, the decisions of the District Courts and Courts of Appeal

uniformly interpreted the amendment as expanding the rights of the injured employee, further protecting him against premature and unwitting surrender to his employer of his right to sue on his own behalf, by delaying the automatic assignment until six months after the entry of an award in a compensation order. Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975). With the exception of two recent decisions by the Fourth Circuit, relied upon by the Petitioner herein and discussed below, the cases within all circuits considering the question have held that § 933 (b) does not cause an assignment of the third party claim until six months after the entry of some order by the deputy commissioner or other agency of the U. S. Department of Labor, not only requiring that the employer pay compensation but also fixing the total amount of compensation payable to the employee under the Act. Ambrosino v. Transoceanic S.S. Co., 675 F.2d 470 (2nd Cir. 1982);

Vederame v. Torm Lines, 670 F.2d 5 (2nd Cir. 1982); Collier v. Mendis, Inc., 526 F.Supp. 459 (D.C.D.C. 1981); Fearson v. Johns-Manville Sales Corp., 525 F.Supp. 671 (D.C.D.C. 1981); Dunbar v. Retla S.S. Co., 484 F.Supp. 1308 (E.D.Pa. 1980); Seaquest Marine, Inc. v. Cove Shipping, Inc., 474 F.Supp. 164 (W.D.Wash. 1979); Rodriguez v. Compass Shipping Co., Ltd., 456 F.Supp. 1014 (S.D.N.Y. 1978), affirmed 617 F.2d 955 (2nd Cir. 1980).

It was clearly the intent of Congress, by the specific and unambiguous language placed in the statute, that no statutory assignment of the employee's claim can take place without the actual entry of an order by the Department of Labor awarding compensation benefits to the employee. In his concurring opinion in McClendon v. Charente S.S. Co., 348 F.2d 298 (5th Cir. 1965), Chief Judge John R. Brown made this clear in disposing of a contention that the 1959 amendment

(delaying assignment until six months after an award) was intended to restrict the employee's right to pursue his claim:

> "And as to a supposed protection to the employer-stevedore or the tortious third party shipowner it is of no real value as a built-in sometime available, prescriptive limitation. Except for death cases and in a few other rare injury situations cases under the Longshoremen's Act are processed frequently without formal claim and almost invariably without a final formal award by the deputy commissioner. Atlantic & Gulf Stevedores, Inc. v. Donovan, 5 Cir., 1960, 274 F.2d 794, 800; 279 F.2d 75. Of course only a final award triggers the six month period. Consequently as to most cases the tortious third party remains vulnerable until the appropriate State-Federal-Local-Marine Statute of Limitations or Laches cuts off the claims.
>
> The 1959 amendment helps neither the distraught stevedore-employer or the harried third party in any predictable, meaningful regular way. This eliminates all save the injured worker as the object of congressional concern. As to him the purpose was to expand, not contract, his rights." [348 F.2d at 303-304. Emphasis added.]

The decision by the Sixth Circuit in the present case, Duris v. Erato Shipping, 684

F.2d 353 (6th Cir. 1982) is fully consistent with the foregoing decisions.

The Rodriquez Decision

Quite contrary to the urgings of the Petitioner herein, this Court's recent decision in Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981) is fully consistent with the interpretation of § 933 (b) expressed by the foregoing cases. The question in that case was limited to the conclusiveness of the statutory assignment once, in fact, it had occurred. In deciding that question, this Court once again set out the history of § 933 from its origin, in much the same language as it had previously used in American Stevedores v. Porello, supra.[2]

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2. "As originally enacted in 1927, the Act gave an injured longshoreman the right to elect between the certain recovery of compensation from his employer without any proof of fault, or the less certain, but probably more

Then, fully consistent with the decision by the Sixth Circuit in the present case, this

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generous, remedy of an action for damages against a negligent third party. The employee's election to accept compensation under the Act effected and immediate assignment to his employer of his cause of action for negligence. Under the original Act, the longshoreman could pursue either remedy but not both, and nothing more than the acceptance of compensation was required to evidence the employee's election. See, e.g., Toomey v. Waterman S.S. Corp., 123 F2d 718, 721 (CA2 1941).

In 1938, Congress amended the Act to provide that the acceptance of compensation would operate as an assignment only if the payment was 'under an award in a compensation order filed by the deputy commissioner.' This procedural change was designed to protect the employee from the harsh consequences of an improvident election." [Rodriguez, 451 U.S. at 604, 605. Emphasis added, footnotes omitted.]

"In 1959, Congress acted to remedy the problems created by the potential conflict between the interests of the employer and the employee in prosecuting third party claims. Its solution was not to create or define an exception to the assignment by operation of law. Rather, Congress substantially adopted the central provisions of the Zelenko bill by amending § 33 (b) to postpone the assignment by operation of law until six months after the acceptance of compensation under an award . . . . " [Rodriguez, 451 U.S. at 610. Emphasis added, footnotes omitted.]

Court held that the unequivocal language of § 933 (b) required a plain and literal interpretation of its meaning:

> "In making this evaluation, however, we adhere to the rule that, '[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive.' Consumer Product Safety Commission v T G E Sylvania, Inc. 447 US 102, 108." [451 U.S. at 604.]
>
> The language of § 33 (b) is both mandatory and unequivocal. It provides that the acceptance of compensation under an award 'shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against third person unless such person shall commence an action against such third person within six months after such award.' 33 USC § 933 (b) (Emphasis supplied by Court)
>
> The only conditions precedent to the statutory assignment are the acceptance of compensation pursuant to an award in a compensation order and the passage of the required period of six months. These conditions are admittedly satisfied in these cases." [451 US at 602, 603. Emphasis added, footnotes omitted.]

No part of the decision in Rodriguez or the interpretation of § 933 therein would warrant reversal of the present decision from

the Sixth Circuit. In fact, an examination of the facts before the Court in Rodriguez will reflect that it fully supports the Sixth Circuit decision in the present case. The opinion of the District Court in Rodriguez v. Compass Shipping Co., 456 F.Supp. 1014 (S.D.N.Y. 1978) reflects that the facts were that the Department of Labor had approved and ordered the payment of an agreed settlement of the employee's workman's compensation claim. In holding that the compensation order entered in enforcement of the settlement, fixing the total compensation payable to the employee, triggered the time running toward the statutory assignment, the District Court stated:

> "For, as the statute makes clear, mere acceptance of compensation, absent an 'award', does not effect a statutory assignment of the injured party's claim.[4]

---

[4] The reverse was true before 1938. Until the statute was amended in that year, the simple acceptance of compensation did

> create an assignment of the claim. See American Stevedores, Inc. v. Porello, 330 U.S. 446, 454 n. 18, 67 S.Ct. 847, 91 L.Ed. 1011 (1946)." [456 F.Supp. at 1019. Emphasis supplied by Court.]
>
> The ordering of compensation by a claims examiner or other delegee of the deputy commissioner, as well as by the deputy commissioner himself, fully satisfies the purpose of the award requirement, which is solely to insure the injured person an opportunity to consider fully the consequences under § 933 (b) of accepting compensation before those consequences are incurred." [456 F.2d at 1020. Emphasis added.]

Since 1976, the Department of Labor Regulations at 20 C.F.R. § 702.315 (a) require such settlement approvals to be in the form of a formal compensation order.

The Error of Liberty Mutual and Simmons

The Petitioner herein relies upon and urges this Court to accept the "logic" of decisions by the Fourth Circuit in Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977), and Simmons v. Sea-Land Services, Inc., 676 F.2d 106 (4th Cir. 1982).

In those decisions, the Fourth Circuit stands alone in going beyond the expressed language of § 933 (b) to hold that an "award" can consist of the acceptance of voluntary compensation payments, coupled with the filing, by the employer, of report forms required by the Act in all cases. In those two decisions, we respectfully submit, the Fourth Circuit begins with a misconception and then takes it beyond its logical application.

The holding in Liberty Mutual v. Ameta, supra, was only that the compensation carrier was entitled to reimbursement of its compensation payments, where a recovery had already been made in a suit by the employee against the shipowner. The equities in that case clearly compelled a finding on some basis that the compensation carrier was entitled to reimbursement. The Fourth Circuit was apparently acting on the misconception that a finding of some sort of award was necessary

in order to accomplish this equitable result. The Court thus manufactured an award out of bits and pieces, since it thought that such was necessary to reach the intended result.

Quite obviously, a statutory assignment under § 933 (b) is not necessary upon those facts. The Fifth Circuit considered the same question and reached the same end result, without falling into that misconception and without creating an "award" by prestidigitation, in Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975). The employer or compensation carrier has an equitable right under General Maritime Law to recoupment of their compensation payments. In Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404 (1969), this Court specifically held that the stevedoring company has a cause of action under General Maritime Law to recover this financial loss caused by a negligent shipowner, irrespective of the statutory assignment.

In Simmons, the Fourth Circuit then took that misconception beyond its logical application to hold that the injured longshoreman's action was assigned to his employer under § 933 (b) six months after the acceptance of voluntary compensation payments and the filing, by the employer, of report forms required under the Act. With the exception of Liberty Mutual, there is no support in any of the cases interpreting this Section since its origin for a holding that such can constitute "an award in a compensation order." The Fourth Circuit was apparently acting under a mistake in fact in assuming that the mandatory report forms, specifically LS-206 and LS-208, were filed by the deputy commissioner (which misconception the Petitioner seeks to perpetuate here). Such, of course, is not a factually correct statement of that which occurs upon the beginning or ending of voluntary compensation payments in any case. Section 914 (a)

requires the employer to promptly pay compensation "without an award" except where it contests its liability to pay compensation. Section 914 (c) then provides:

> "Upon making the first payment, and upon suspension of payments for any case, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be." [Emphasis added.]

It is highly significant that the form prescribed by the Secretary for providing such notice (LS-206) and which was a crucial element used by the Fourth Circuit in constructing an award is labeled in bold letters: "PAYMENT OF COMPENSATION WITHOUT AWARD." The same notice form is present in the record herein. [Joint Appendix, p. 48]

The Fourth Circuit felt, for some reason, that such a broad reading of the section was necessary to protect the rights of the employer. However, the employer was not before the Court in that case, nor was it

seeking the assignment of the employee's claim. In so doing the Fourth Circuit stands by itself in this reading of the statute and was in error for a number of reasons. The first of those is that its decision ignores the basic proposition that the Longshoremen's and Harbor Workers' Compensation Act is to be liberally construed in favor of the injured employee. Voris v. Eikel, 346 U.S. 328 (1953); Pillsbury v. United Engineering Co., 342 U.S. 197 (1952); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1980). "As we have long held, 'this Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'" Director, OWCP v. Perini North River Assoc., _____ U.S. _____, 74 L.Ed.2d 465 (1983).

Moreover, other sections of the statute treat very differently the employer's obligation for payment of compensation without an award, as opposed to its obligation for

payment of compensation under an award. For example, within § 914, subsection (b) requires payment of compensation without an award within fourteen days, whereas subsection (f) allows only ten days for payment of compensation under an award. Subsection (e) imposes a ten percent penalty on untimely payment of compensation without an award, whereas subsection (f) imposes a twenty percent penalty for nonpayment of compensation owed under an award.

Further, Simmons overlooks the fact that § 919, establishing procedure in respect of claims, specifically defined the term "award in a compensation order" for the purposes of the Act:

> "(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each."

Of course, the "award" created by Simmons fails to meet such definition.

Finally, the Fourth Circuit in Simmons ignored the many recent mandates by this Court that, in interpreting such statutes, its " . . . task is to give effect to the will of Congress, and where its language has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive . . . . " Griffin v. Oceanic Contractors, Inc., _____ U.S. _____, 73 L.Ed.2d 973 (1982); Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980); Potomac Electric Power Co. v. Director, Workers' Compensation Programs, 449 U.S. 268 (1980); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979); Rodriguez v. Compass Shipping Co., 441 U.S. 596 (1981); Director, OWCP v. Perini North River Associates, _____ U.S. _____, 74 L.Ed.2d 465 (1983). The language selected by Congress in the 1959 amendment to § 933 (b) is clear and

unequivocal. The assignment of the third party claim to the employer takes place only six months after acceptance of compensation "under an award in a compensation order." Section 919 (e) defines those words. The Fourth Circuit in Simmons has gone beyond the language of the statute to create an "award in a compensation order" where none in fact exists.

The Fourth Circuit decision in Simmons has not been followed by any other Circuit within the federal judiciary. Rather, it has been consistently criticized. See, for example, Rother v. Interstate & Ocean Transport Co., 540 F.Supp. 447 (E.D.Pa. 1982), where the facts were vertually identical to those in Simmons as well as those in the present case. Compensation had been paid for a period of time. The insurance carrier had filed the report forms required by the Act. Compensation payments were suspended when the Plaintiff had returned to work. The

Defendant contended that there had been an assignment of the third party claim to the Plaintiff's employer under § 933 (b). The Court specifically declined to follow Simmons, holding that Rodriguez required the entry of some type of order for payment of compensation by the Department of Labor before such assignment could take place. In analyzing the question, the Court stated:

> "In Rodriguez v. Compass Shipping Co., . . . , the Second Circuit held that a settlement agreement embodied in a DOL Form, executed after an informal conference between the employee, employer and claims examiner and signed by all three parties was a compensation "order" for purposes of statutory assignment. Accord, Theodore v. Moore-McCormack Lines, Inc., . . . ; See, Ambrosino v. Transoceanic S.S. Co., . . . ; Vederame v. Torm Lines, ... But the Supreme Court, in reviewing that decision explicitly only assumed, and declined to decide that the Second Circuit was correct. Rodriguez, Supra, ... Moreover, the documents filed here by USS differ markedly from a settlement agreement endorsed by the DOL following an informal conference.
>
> To hold that voluntary acceptance of some compensation is tantamount to an award of benefits where the total amount of compensation remains contested on the

record would misconstrue the statute." [540 F.Supp. at 484, 485. Citations omitted.]

See also Kirsch v. Bangladesh Shipping Corp., 544 F.Supp. 83 (E.D.Pa. 1982). In a very recent decision, the Southern District of Alabama likewise rejected Simmons. In Howell v. Ocean Transport Co., Inc., _____ F.Supp. _____ (S.D.Ala. Dec. 2, 1982), that Court stated:

> "No amount of alchemy can transmogrify a voluntary payment into a 'award in a compensation order filed by the deputy commissioner or Board . . . . ' The opinion of the Court of Appeals for the Fourth Circuit in Simmons is simply squarely contrary to the express statutory language."

The New York State Court, Appellate Division is in accord; Gray v. Rederi A/S Myren, _____ N.Y.Supp. _____ (N.Y.Law J., Aug. 26, 1982).

Perhaps the most recent decision on this question is that in Hall v. International Union Lines, Inc., 552 F.Supp. 816 (E.D.La.

1982), wherein the District Court discusses the error of Simmons at length:

> "Other circuits, including post-Rodriguez decisions, have flatly rejected Fourth Circuit jurisprudence and have ruled that the mere acceptance of benefits, even when combined with the required verification forms, does not constitute 'acceptance under an award in a compensation order formed by the deputy commissioner.' [Citing cases discussed herein.] This line of authority is based upon the time honored judicial maximum giving conclusive effect to the express terms of the Act. See Consumer Product Safety Commission v. GTE, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). In this case, the critical statutory language is: '[a]n acceptance of such compensation under an award in a compensation order filed by the deputy commissioner . . . . ' In relying solely upon acceptance of compensation for triggering the statutory assignment, Simmons and its progeny effectively read 'under an award in a compensation order filed by the deputy commissioner' out of the Act. Such a construction, however, defies the intent of Congress when it amended the Act in 1938 to include this very language. . . . . The change was obviously designed to benefit the employee. It is unlikely that a dependent longshoreman will knowingly repudiate substantial compensation benefits. His acceptance, however, of these uncontested payments may be in ignorance of the total benefits he is entitled to collect, the seriousness of his injury, and the legal consequences of his electing to accept

compensation. . . . . The entry of an award by the deputy commissioner, or his authorized representative, fixes the total amount of compensation due and 'puts the longshoreman on notice that he has six months within which to exercise his third-party recovery.'" [552 F.Supp. at 818.]

"In this case, the filing of the employer's notice concerning the initiation of compensation is not a compensation order. The document speaks for itself. The standard form is entitled 'Payment of Compensation Without Award,' and it is submitted without any affirmative action by the deputy commissioner. . . . . The employee, therefore, has no guarantee of a total award under this document. The form simply verifies that the employer has commenced compensation benefits without an award. 33 U.S.C. § 914 (c). Such voluntary payments are in fact mandatory unless the employer contests liability under the Act. 33 U.S.C. § 914 (a). . . . . Thus, the Act distinguishes between so-called voluntary compensation payments and payments made pursuant to an award in a compensation order entered by the deputy commissioner. The documents and evidence submitted on this motion clearly demonstrate that compensation was paid without an order or award by the deputy commissioner. In the absence of such an award or order, Plaintiff's acceptance of compensation does not activate the statutory assignment provision of the Act." [552 F.Supp. at 819.]

Even the Maryland Court of Special Appeals (which is within the Fourth Circuit)

has rejected Simmons in Spoto v. Washington Metropolitan Area Transit, 52 Md.App. 424 (1982). There, the Maryland Court of Special Appeals was correct in its description of the plain language of § 933 (b):

> "As we note from the simple, direct language of § 33 (b) quoted above, it was encumbent upon the Defendants to show more than the payment and acceptance of workers' compensation payments. Only acceptance of such compensation
>
> - Under an award
> - In a compensation order
> - Filed by the deputy commissioner or . . . Board
>
> triggers an assignment to the employer, unless the person entitled to compensation commences an action 'within six months after such award.' (Emphasis added.)" [52 Md.App. at 426]

It is respectfully urged that this Court give the same meaning to the plain wording of the statute.

Protecting the Interests of the Employer

The Petitioner herein will no doubt urge this Court to read the statute differently,

"in order to protect the interests of the stevedoring company-employer." However, one must ask why then is the stevedoring company-employer not a party to this case. It is glaringly obvious that the employer herein is not before this Court seeking an order assigning its employee's third party claim.

The stevedoring companies definitely do not want an early, automatic assignment of the third party claim in all cases. As the Sixth Circuit clearly pointed out (not as a reason for declaring void an assignment mandated by the language of the statute) the stevedoring company will rarely desire to sue its valued business customer to recoup compensation paid to its own injured employee. In almost all cases, the stevedoring company would much rather have the injured employee bring his own action. In the event of success in such action by the employee, the stevedoring company is clearly entitled to recoupment of all of its compensation and

medical expenses, under Bloomer v. Liberty Mutual Insurance Co., 445 U.S. 74 (1980); thus permitting the stevedoring company to have its cake and eat it too.

In the unusual case in which the stevedoring company desires to bring the suit and the employee fails to do so after voluntary compensation payments, the stevedoring company clearly has a remedy. If an assignment under § 933 (b) was felt necessary, the employer could apply for and receive an award fixing its total compensation liability, thus triggering the assignment provision. American Stevedores v. Porello, 330 U.S. 446 (1946). Of course, a statutory assignment of the third party claim is not necessary, since the employer has a cause of action under General Maritime Law for its financial losses caused by a negligent shipowner. Federal Marine Terminals v. Burnside Shipping Co., 394 U.S. 404 (1969); Louviere v. Shell Oil Co., 509 F.2d 278 (5th Cir. 1975).

The Burnside decision survives the 1972 amendments to the Longshoremen's Act, as discussed in the very recent decision by the Ninth Circuit in Crescent Wharf & Warehouse Co. v. Barracuda Tanker Corp., 696 F.2d 703 (1983). The question in the case was whether the stevedoring-employer, without an assignment under § 933, had the right to pursue the third party claim. Addressing that issue, the Court stated:

> "The short answer to issue 2 is 'Yes.' The Supreme Court held in Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969), that a Plaintiff standing in the position of Crescent Wharf could recover from the vessel's owners the amount of compensation payments occasioned by the owners' negligence. Burnside controls here.
>
> The Owners strenuously contend that Crescent Wharf's Burnside action for indemnity was abrogated by the 1972 amendments to the LHWCA. The Owners correctly claim that two mainstays of Burnside, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), and Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), were expressly overruled by the 1972 amendments. Such overruling, however, is not the end of our inquiry.

> The legislative history of the 1972 amendments shows that Congress intended the elimination of the Ryan and Sieracki type of causes of action. However, no mention was made of the Burnside type of a cause of action.
>
> The Supreme Court said in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979) (addressing question of whether 1972 amendments to LHWCA altered shipowner liability): 'This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.'" [696 F.2d at 706.]

Thus, the assertion by the Petitioner herein and the shipowners' amicus, that there must be an award of compensation in all cases under the Act in order to protect the interests of the employer, is not based upon fact or law. The only parties who "must" have an award in all cases under the Act are the shipowners, who thereby seek to impose an agonizingly short statute of limitations on the party most likely to assert a cause of action against them: the injured longshoreman.

The Tragedy of a Six Month Limitation

As a final thought, this Court should not act under the misapprehension that a reversal of the Sixth Circuit in the present action and the endorsement of Simmons would result in the elimination of many third party claims by injured longshoremen, thus reducing the docket load of the courts. Since § 914 requires the first payment of compensation to be made within fourteen days of injury, the result of Simmons would leave the injured longshoreman with only six months and fourteen days from the date of his injury, within which to file suit on his claim. Faced with such an amazingly short limitations period, any attorney representing an injured longshoreman would be required to file suit immediately upon being retained. Thus, the Courts would be flooded with suits which had to be filed without any reasonable opportunity for investigation into the question of whether the shipowner was negligent, or

without any opportunity to weigh the question of whether the economic impact of the longshoreman's injury would warrant pursuit of the third party claim.

The unfortunate result of such a brief and unpredictable limitation of action would thus be to place in Court many claims without merit, and cause many meritorious third party claims to be lost unwittingly by the injured longshoreman who thought he had three years to bring his suit under 46 U.S.C. § 763a.

CONCLUSION

The shipowners and their counsel are indeed ingenious. They here seek to take a novel theory from an unusual case and stretch it to apply to all others. The theory accepted by the Fourth Circuit in Liberty Mutual was then indeed novel, but perhaps suited to the equities of the peculiar facts in that unusual case. In such a limited fact situation, it worked no restriction on the rights

of the injured longshoreman. However, when applied to the facts most normally found in the employee's third party claim, such interpretation of § 933 strays far from the intended purposes of the Longshoremen's and Harbor Workers' Compensation Act.

The entire history of § 933 from its origin, and the case law interpreting this section including this Court's decision in Rodriguez, compel this Court to read the language of the statute to mean exactly what it says. The shipowner should not be permitted to create by slight of hand an "award" where none exists.

We respectfully suggest that the decision of the Sixth Circuit herein is imminently correct and should be affirmed.

Respectfully submitted on
behalf of the Association of
Trial Lawyers of America,
Howard A. Specter, President,
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No. 82-502

In the
Supreme Court of the United States
October Term, 1982

PALLAS SHIPPING AGENCY, LTD.,
Petitioner,

vs.

JOSEPH DURIS,
Respondent.

PROOF OF SERVICE

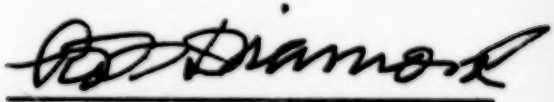
I, Ross M. Diamond III, one of the attorneys for Association of Trial Lawyers of America, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 2nd day of March, 1983, I served copies of the foregoing brief amicus curiae in support of Joseph Duris, Respondent, on the several parties thereto, as follows:

1. On Pallas Shipping Agency, Ltd., Petitioner, by mailing copies in a duly addressed envelope, with first class postage prepaid, to its attorney of record as follows:

Lucian Y. Ray
Attorney for Petitioner
1050 Union Commerce Building
Cleveland, Ohio 44115

2. On Joseph Duris, Respondent, by mailing ocpies in a duly addressed envelope, with first class postage prepaid, to his attorney of record, as follows:

Frank W. Cubbon, Jr.
Attorney for Respondent
335 North Superior Street
Toledo, Ohio 43604



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ATTORNEYS AT LAW

Cleveland, Ohio 44115
January 10, 1983

Mr. Michael S. Starr
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1050 31st Street N.W.
Washington, D.C. 20007-4499

PALLAS SHIPPING AGENCY, LTD. v. JOSEPH DURIS
IN THE SUPREME COURT OF THE UNITED STATES
CASE NO. 82-502 - Our File 681RCD

Dear Mr. Starr:

We wish to acknowledge receipt of Thomas W. Gallagher, Esq.'s letter of January 7, 1983, in which you seek our consent to file a Brief Amici Curiae on behalf of the Association of Trial Lawyers of America in support of the Respondent.

On behalf of the Petitioner, Pallas Shipping Agency, Ltd., we hereby grant the required consent pursuant to Rule 36 of the Rules of the United States Supreme Court.

Yours very truly,

RAY, ROBINSON, HANNINEN & CARLE

By W. H. Carle

cc: Ross N. Diamond III, Esq.
Thomas W. Gallagher, Esq.

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January 7, 1983

Michael S. Starr,
The Association of Trial Lawyers of America
1050 31st Street, NW
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RE: Case Number: 82-502 in the
Supreme Court of the United States
October Term, 1982
Pallas Shipping Agency, Ltd.,
Petitioner,
vs.
Joseph Duris,
Respondent

Dear Mr. Starr:

We are in receipt of and wish to acknowledge your letter of January 3, 1983, in which you seek permission to file a Brief Amici Curiae in the aforementioned case, on behalf of the Association of Trial Lawyers of America.

On behalf of the respondent, Joseph Duris, we hereby grant our consent and look forward to your participation in this action.

Yours very truly,

Thomas W. Gallagher

TWG:mw

cc: Ross Diamond, Esquire